

*Law Offices*  
**ALLRED, MAROKO & GOLDBERG**  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

6300 WILSHIRE BOULEVARD  
SUITE 1300  
LOS ANGELES, CALIFORNIA 90048  
(323) 653-6530  
FAX (323) 653-1660  
www.amglaw.com

NATHAN GOLDBERG\*  
MICHAEL MAROKO\*  
GLORIA R. ALLRED\*  
JOHN S. WEST  
DOLORES Y. LEAL  
R. TOMÁS OLMOS  
RENEE MOCHKATEL  
MARGERY N. SOMERS  
MARÍA G. DÍAZ  
RAMIT MIZRAHI

\*A PROFESSIONAL CORPORATION

November 17, 2008

**VIA FEDERAL EXPRESS**

To Chief Justice Ronald M. George and the  
Associate Justices,  
**SUPREME COURT OF CALIFORNIA**  
350 McAllister St.  
San Francisco, CA 94102

**RECEIVED**

**NOV 17 2008**

**CLERK SUPREME COURT**

***Re: Tyler, et al. vs. Horton, et al.,*** Case no. S168066 (Proposition 8 challenge):  
Objections and Response to Letter Brief by the Pacific Justice League

Honorable Justices:

Allred, Maroko & Goldberg represents the Petitioners (Robin Tyler, Diane Olson, Cheri Schroeder, and Coty Rafaely, collectively "the Tyler-Olson Petitioners") in the above entitled matter. The Tyler-Olson Petitioners have directly petitioned the Supreme Court for a writ<sup>1</sup> commanding the State of California, inter alia, to desist from recognizing the validity of, enforcing, or maintaining new section 7.5 of the Constitution, which was adopted by the voters of this State in a November 8, 2008 ballot initiative. Their Petition was directed at the State of California, at Edmund G. Brown in his capacity as Attorney General for the State, and/or at Debra Bowen, in her capacity as Secretary of State. On November 12, 2008, the Supreme Court directed that preliminary oppositions be filed to the Petition (and to other petitions filed concerning Proposition 8).

---

<sup>1</sup> A writ of mandamus, prohibition or other extraordinary relief is sought.

On November 14, 2008, an entity identifying itself as the Pacific Justice Institute, which (a) is not a party to these proceedings, and (b) has not sought or been granted leave to file any amicus brief or otherwise intervene in these proceedings, filed a "Letter Brief" requesting that the Supreme Court deny the relief sought by the Tyler-Olson Petitioners. For the reasons set forth hereinafter, the Tyler-Olson Petitioners object to the Pacific Justice Institute's Letter Brief. In the event that the Supreme Court is inclined to consider the matters set forth in that Letter Brief, the Tyler-Olson Petitioners request that the Court consider the following responsive arguments.

**(I) Objections to the Letter Brief by Pacific Justice League**

The filing of Letter Briefs by non-parties before the Supreme Court is governed by Rule 8.500 of the California Rules of Court. Rule 8.500(g) requires that an entity seeking to file such a letter "describe the interest of the amicus curiae." Here, the Pacific Justice League describes its interest as (1) providing legal counsel to religious organizations "relative to amending the California Constitution so that marriage is defined with clear parameters," and (2) "protecting" religious entities "from interference by the government, in violation of the Establishment Clause, in theological and ecclesiastical matters." Based upon those representations, it is respectfully submitted that the Pacific Justice League does not have a sufficient interest in this matter to warrant consideration of its Letter Brief for purposes of Rule 8.500(g).

**(A) There is no lack of clarity in the definition of marriage**

There is no lack of clarity with regard to the definition of marriage. Following the Supreme Court's May 15, 2008 decision in In re Marriage Cases, 43 Cal.4th 757, 76 Cal.Rptr.3d 683 (2008), individuals otherwise eligible to marry were permitted to marry the person of their choice regardless of gender. Following the passage of Proposition 8, marriage is an individual can only marry someone of the opposite gender. Thus, putting aside disputes over the constitutionality of Proposition 8, there is no lack of "clear parameters" regarding the definition of marriage.

**(B) These Proceedings Pose No Risk of Government Interference in Theological and Ecclesiastical Matters.**

Furthermore, the Petition now before the Court relates to whether Proposition 8 new section 7.5 of the Constitution (Proposition 8) works such fundamental and far reaching changes to the Equal Protection Clause of our Constitution as to constitute a true constitutional revision which is invalid because it was not accomplished by either of the two constitutionally required methods- a constitutional convention and popular ratification (art. XVIII, § 2) or a legislative submission of the measure to the electorate (art. XVIII, § 1). In these proceedings, the Tyler-Olson Petitioners argue that as a result of the failure to follow those two alternative processes, the Constitution has effectively been revised without a requisite two thirds vote of each house of the Legislature.<sup>2</sup> Regardless of one's view of whether Proposition 8 constitutes a revision of the Constitution, it is clear that these proceedings pose no risk of government interference in theological and ecclesiastical matters. Regardless of how the Supreme Court rules on the legal question of whether Proposition 8 constitutes an improper revision of our Constitution, churches (and all religious organizations are free to conduct, or to refrain from conducting) marriages according to their own tenets.<sup>3</sup>

---

<sup>2</sup> A two thirds vote of the Legislative is required for either a constitutional convention to revise the constitution or for a legislative submission of a measure to revise the constitution.

<sup>3</sup> The same is true if the Supreme Court decides this case on the other grounds in the Petition, including the argument that Proposition 8 violates the separation of powers doctrine embodied in Article III, § 3 of the Constitution. The Tyler-Olson Petitioners argue that under the separation of powers doctrine, "the Legislature may not undertake to readjudicate controversies that have been litigated in the courts and resolved by final judicial judgment." Superior Court v. County of Mendocino, 13 Cal.4th 45, 53, 51 Cal.Rptr.2d 837, 842 (1996).

## **(II) Substantive Responses**

In the event that the Supreme Court finds that the Pacific Justice League has a sufficient interest to merit consideration of its Letter Brief, the Tyler-Olson Petitioners offer the following substantive response.

The Pacific Justice League appears to (a) that the Tyler Olson Petitioners have not shown sufficient merit to justify an immediate stay of enforcement of Proposition 8, and (b) that the Supreme Court lacks authority to issue an immediate stay in a case such as this one. Both arguments are without merit.

### **(A) Authority to Stay**

The Pacific Justice League appears to (a) that the Tyler Olson Petitioners have not shown sufficient merit to justify an immediate stay of enforcement of Proposition 8, and (b) that the Supreme Court lacks authority to issue an immediate stay in a case such as this one. Both arguments are without merit.

While the Pacific Justice League focuses on semantics (i.e., the title of a writ) in arguing that no stay should issue, the Supreme Court's authority to issue the stay sought by the Petitioners is beyond reasonable dispute. In People ex rel. San Francisco Bay Conservation and Development Commission v. Town of Emeryville, 69 Cal.2d 533, 538, 72 Cal.Rptr. 790, 793 - 794 (1968), the Supreme Court commented upon its own powers in relevant part as follows: "In place of the restrictive language formerly appearing in the Constitution, the language used in Section 10 is phrased in such a way as to permit the courts to grant 'extraordinary relief in the nature of' the historical common law writs." (Citation omitted) By contrast, no explicit constitutional grant is necessary to authorize issuance of such *auxiliary writs* as supersedeas, long recognized to be an attribute of the *inherent power of the courts to preserve their own jurisdiction*. (Citation omitted) 'Among the many procedural phrases deleted from the former Constitution, the Commission deleted references to the appellate courts' power to issue 'writs in aid of appellate jurisdiction'-I.e., the writ of supersedeas. This action was taken upon the ground that Any such stay in aid of appellate jurisdiction constitutes an

exercise of the inherent power of the courts having that jurisdiction.' (Italics added.) (Citation omitted) ...We are not unmindful that the *stay order in this case is injunctive in nature*, since it operates directly to restrain the fill activities of the town; but its office remains similar to that of a writ of supersedeas-to preserve the status quo pending determination of the appeal-and its issuance is therefore controlled by the same principles. Furthermore, in the newly enacted chapter governing civil appeals (Code Civ.Proc. s 901 et seq.; Stats.1968, ch. 385), the Legislature affirms the inherent power of appellate courts in this state to issue injunctive stay orders in aid of jurisdiction: 'The provisions of this chapter shall not limit the power of a reviewing court or of a judge thereof to stay proceedings during the pendency of an appeal or to issue a writ of supersedeas or to suspend or modify an injunction during the pendency of an appeal or to make *any order appropriate to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction.*' (Italics added.) The stay order issued by this court, therefore, was not beyond our inherent powers." (Emphasis added)

It is clear that the Supreme Court, like the Court of Appeal, has the power to stay enforcement of statues that impinge upon constitutional rights. That power was expressly confirmed in American Academy of Pediatrics v. Lungren, 16 Cal.4th 307, 384, 66 Cal.Rptr.2d 210, 260 - 261 (1997), in which an appellate injunction against the operation of a statute which impinged upon a constitutional right was confirmed: "As United States Supreme Justice Lewis Powell has written, '[t]he need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter.' ( citation omitted) California's parental consent law, though certainly well intentioned, lacks the sensitivity required to satisfy the privacy guarantee of our state Constitution. Because the parental consent law seriously invades the privacy interests of minors, and because its practical effects are such that it does not significantly advance any countervailing interest of either the state, the pregnant minor women, or their parents, I[concur in the judgment] uphold[ing] the decisions of the superior court and the Court of Appeal declaring unconstitutional and *enjoining the enforcement of the parental consent law on the ground that it violates the right of privacy guaranteed to every Californian-man, woman, and*

*child-by our state Constitution.*" (Emphasis added)

**(B) The Beneficial Interest of the Petitioners**

" "[W]here the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced" (Citation omitted). The exception promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right." Green v. Obledo, 29 Cal.3d 126, 144, 172 Cal.Rptr. 206, 216 - 217 (1981)

Thus, the real issue before the Supreme Court is whether, under the facts in the Petition, a stay is necessary to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction. This question must be answered in the affirmative.

The petitioners who are married, Ms. Tyler and Ms. Olson, want to preserve their marriage pendente lite. They, and thousands of others, have actual or potential emotional, family, child rearing, income tax and/or benefit issues all tied up in their existing marriages. A stay is necessary to preserve the status quo as to them.

Those seek same sex marriage, but who were not married as of the passage of Proposition 8, like Ms. Schroeder and Ms. Rafaely, have a vital interest in the effectiveness of relief. While waiting for a decision, those individuals may die without ever having tasted the joy of marriage to the individual of their choice. As to them, no relief would be effective. Likewise, as to individuals presently denied the right to marry, there is no remedy for the benefits of marriage that were denied while this matter is pending.

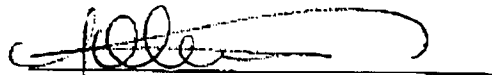
These points are adequately raised in the Petition, which alleges in paragraph 26 that "Petitioners have no plain, speedy and adequate remedy in the ordinary course of law" because "it would take years for this matter to wind its way through the Superior Court and Court of Appeal levels... and the right of same sex individuals to marry, would be uncertain", and in paragraph 27 that "[m]onetary damages are inadequate to compensate for the denial of a fundamental civil right such as marriage" and that "ordinary legal remedies do not address the denials of equal protection inherent in the definition of marriage adopted in Proposition 8."

**(III) Conclusion**

For all of the foregoing reasons, it is respectfully submitted that the arguments contained in the Letter Brief by the Pacific Justice League should be rejected.

Dated: November 17, 2008

ALLRED, MAROKO & GOLDBERG  
GLORIA ALLRED  
MICHAEL MAROKO  
JOHN STEVEN WEST



JOHN S. WEST

Attorneys for Petitioners ROBIN TYLER  
and DIANE OLSON

cc: All Counsel of Record  
See attached service list

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the County of Los Angeles, State of California. I am over the age of 18  
4 and not a party to the within action; my business address is: 6300 Wilshire Boulevard, Suite  
5 1500, Los Angeles, California 90048.

6 On November 17, 2008, I served the foregoing document described as **Objections and**  
7 **Response to Letter Brief by the Pacific Justice League** on the interested parties in this  
8 action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

9 Edmund G. Brown, Jr.  
10 Christopher E. Krueger  
11 State of California, Department of Justice  
12 Office of the Attorney General  
13 1300 I Street, Suite 125  
14 Post Office Box 944255  
15 Sacramento, CA 94244

16 Debra Bowen  
17 Secretary of State  
18 1500 11<sup>th</sup> Street  
19 Sacramento, CA 95814

20 Debra Bowen  
21 Secretary of State  
22 455 Golden Gate Avenue  
23 San Francisco, CA 94102

24 ☐ **\* BY MAIL:** I caused such envelope with postage thereon fully prepaid to be placed in  
25 the United States mail at Los Angeles, California.

26 ☐ **BY PERSONAL SERVICE:** I caused such envelope to be hand-delivered to the offices  
27 of the addressee(s).

28 ☐ **\*\* BY FAX:** by transmitting a true copy via facsimile transmission from telecopier  
number (323) 653-1660 located at 6300 Wilshire Blvd., Ste. 1500, Los Angeles,  
California 90048, to the following:

☒ **BY FEDERAL EXPRESS:** I caused such document(s) to be delivered via Federal  
Express in a package designated to be picked up by Federal Express with delivery fees  
provided for to the addressee(s) designated. I am readily familiar with the business  
practice of collecting and processing correspondence to be picked up by an employee of  
Federal Express.

Executed on November 17, 2008, at Los Angeles, California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the  
above is true and correct.

  
Jennifer Shuemaker



**ALLRED, MAROKO & GOLDBERG**  
6300 WILSHIRE BLVD., SUITE 1500  
LOS ANGELES, CALIFORNIA 90048-5217  
Phone (323) 653-6530

**TELECOPIER TRANSMITTAL**

---

**PLEASE DELIVER TO:**

**NAME:** Jorge E. Navarrete, Supervising Deputy Clerk

**COMPANY:** Supreme Court of California

**TELECOPY PHONE NUMBER:** (415) 865-7183

**DESCRIPTION:** S168066 - Robin Tyler et al. v. State of California

**MESSAGE FROM:** John S. West, Esq.

**DATE:** November 17, 2008

**TELECOPY PHONE NUMBER:** (323) 653-4712

**NUMBER OF PAGES including this cover sheet:** 9

**COMMENTS:**

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.

---

Please call Jennifer at (323) 653-6530 if you do not receive all pages or if message is not legible.